

Executive Summary of Discussion Paper on Section 53 of the Title Conditions (Scotland) Act 2003

1. The Discussion Paper deals with an important aspect of the law on real burdens. Real burdens are a type of title condition affecting land, imposed on a burdened property (or properties) in favour of a benefited property (or properties). They may relate to land of any type. This includes flats and houses, as well as commercial properties.
2. Real burdens may be positive or negative. For example, they may require a positive action that property be maintained or they may limit the ability of the owner of the burdened property to erect new buildings on the land or forbid business-use. Real burdens therefore play a key role in regulating housing estates, blocks of flats and other communities.
3. Our earlier Report on Real Burdens (Scot Law Com No 181, 2000) was implemented with modifications by the Title Conditions (Scotland) Act 2003. The 2003 Act was part of a series of legislative measures which abolished the feudal system and reformed Scottish land law. These came into force on 28 November 2004.
4. Section 53 gives implied rights to property owners to enforce real burdens against other property owners, provided that the properties are “related” and are subject to a “common scheme” of burdens. Neither “related” or “common scheme” are defined but section 53(2) gives possible examples of when properties are related, such as flats in the same tenement.
5. Two important points must be made at this stage. First, section 53 only applies where a housing or other property development was commenced prior to 28 November 2004. For developments commenced after that date it is mandatory to specify the benefited properties in relation to real burdens.¹ Secondly, section 53 is about title to enforce real burdens. But, in any case where a burden is breached, a party seeking to enforce will also have to show interest.² This usually means proving that the activity in question will cause material detriment to the enjoyment of their property or to the value of their property.
6. Section 53 did not appear in the draft Bill in our Report, and so the policy in that respect was developed by the then Scottish Executive (now the Scottish Government). It has been the subject of extensive criticism. In 2013 the Justice Committee of the Scottish Parliament received evidence that it causes significant difficulty in practice. The Committee recommended that the Scottish Government should refer section 53 to us.³ This recommendation was accepted.⁴
7. The Discussion Paper comprises eight chapters.
8. Chapter 1 is the introduction. It provides an overview of the project, as well as considering legislative competence and mention of the impact assessment which will accompany our eventual Report.
9. Chapter 2 summarises the common law of implied rights to enforce real burdens which applied prior to 28 November 2003. This provides essential context for section 53.

¹ 2003 Act s 4(2)(c)(ii) and (4).

² 2003 Act s 8(3).

³ See <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/59247.aspx>.

⁴ See https://www.scotlawcom.gov.uk/files/1215/1568/0184/Letter_from_Roseanna_Cunningham_MSP.pdf

10. Chapter 3 considers our Report of 2000 and the recommendations which it made in relation to implied rights of enforcement in common schemes.

11. Chapter 4 reviews the Scottish Executive's consultation which preceded the introduction of the Bill which was to become the 2003 Act and the modifications made to our recommendations when the Bill was introduced.

12. Chapter 5 assesses section 53 and relevant case law. It considers five criticisms which have been made of the provision:

- uncertainty
- complexity
- lack of publicity on the burdened property's title
- over-generosity of application i.e. that it confers rights too widely
- drafting issues.

13. Chapter 6 examines human rights considerations. We accept that any reform would need to comply with the ECHR and in particular Article 1 Protocol 1 (the property protection clause). We note that a preservation scheme was used to address human rights concerns in previous reforms of real burdens.

14. Chapter 7 sets out reform options. Our starting point is identifying what the appropriate policy should be for any replacement provision. Our provisional view is that the policy behind section 53 – that owners within an identifiable community should have title to enforce real burdens affecting that community – is broadly correct, but we seek the views of consultees.

15. We consider that the difficulties with section 53 concern principally the implementation of that policy. Our view is that the indicative examples in section 53(2) need to be replaced with hard and fast rules. We consider also that not only section 53, but its sister provision section 52 – which effectively repeats the common law rules on implied rights in relation to common scheme – should be replaced with new rules.

16. We invite consultees to comment on the following suggested three rules.

- Owners of flats in the same tenement should have title to enforce a common scheme of real burdens against each other.
- Owners of properties subject to real burdens providing for common management in respect of their community should have title to enforce a common scheme of real burdens against each other.
- Owners of properties within a certain distance should have title to enforce a common scheme of real burdens against each other.

17. In relation to the third rule we seek consultees' views on what the distance should be. We ask consultees also whether there should be other rules.

18. Chapter 8 lists our questions and proposals.